Supreme Court, U.S.
FILED

No. 01-11872 JUN 17 2002

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

JUAN ROBERTO LEON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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Dated: June 17, 2002

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29 pg

QUESTION PRESENTED

Does the decision of this Court in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000) apply retroactively so that a criminal defendant sentenced in a manner at odds with the holding in *Apprendi*, but who was sentenced in 1999 before *Apprendi* was decided, may use the holding in *Apprendi* to challenge his sentence in a timely habeas proceeding brought under 28 U.S.C. § 2255?

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OPINIONS BELOW

The judgment of the Court of Appeals for the Eighth Circuit affirming the District Court's denial of the habeas petition is reproduced at the Appendix ("App.") at App. 1a. The Order of the District Court denying petitioner's habeas petition is reproduced at App. 2a-5a.

JURISDICTION OF THIS COURT

The decision of the Court of Appeals affirming the District Court denial of the habeas petition was entered on March 19, 2002. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. § 1254.

STATUTES INVOLVED

The Fourteenth Amendment to the United States Constitution provides that:

> No person shall be . . . deprived of . . . liberty . . . without due process of law.

The Sixth Amendment to the United States Constitution provides that:

> In all criminal prosecutions, the accused shall enjoy the right to a . . . trial by an impartial jury.

Title 28 U.S.C. § 2255 provides that:

> A prisoner in custody under a sentence of a court established by an Act of Congress, claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or the laws of the United States . . . may move the court which imposed the sentence to vacate, set aside, or correct the sentence.

Title 21 U.S.C. § 841(a)(1) provides in relevant part as follows:

> **(a) Unlawful acts**
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute or dispense, a controlled substance . . .
>
> **(b) Penalties**
> Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows . . .

(1)(A) In the case involving a violation of subsection (a) of this section involving –

> (viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;
>
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life . . .
>
> ***
>
> (C) In the case of a controlled substance in schedule I or II . . . except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of <u>not more than 20 years</u> . . . (emphasis added).

STATEMENT OF THE CASE

A. *The Indictment and Trial*

Petitioner Juan Roberto Leon was indicted in the District of Minnesota and tried there for drug trafficking in both methamphetamine and cocaine. After the close of evidence at trial, the jury was instructed by the District Court. While the jury was told by the Court that the government had to prove beyond a reasonable doubt what specific drug was involved (*i.e.*, either methamphetamine or cocaine), the jury was not instructed that it should determine beyond a reasonable doubt (or indeed even by a lower standard) the quantity of the drug involved. (App. 174).[1] After deliberations, Leon was convicted of conspiracy to distribute methamphetamine in violation of 21 U.S.C. §§ 846 and 841(b)(1). (App. 209–213). The jury made no finding as to the amount of methamphetamine. (App. 209-213).

B. *The Sentencing*

At sentencing, on March 23, 1999, the District Court made a finding about the quantity of methamphetamine as follows:

> The question here is, is there a preponderance of the evidence that he dealt in methamphetamine in a quan-

[1] Numbers in parenthesis following "App." refer to the habeas record filed in the District Court. This can be submitted if the Court desires.

> tity in advance or in excess of 5 kilograms, and the Court is quite comfortable that he did and makes that determination based on the evidence adduced at trial.

(App. 225-26) (emphasis added). Based on this quantity finding, the District Court concluded under the Sentencing Guidelines that "the base offense level is 36 for Count I . . . [for] intent to distribute a substantial quantity of methamphetamine identified as in excess of 5 kilograms." (App. 227). The Court noted Leon's criminal history of four prior convictions and found that, in combination, that would result in a sentencing range of "262 to 327 [months]." (App. 227). Leon was sentenced to a prison term of 300 months, a sentence within that range. (App. 233). This amounts to 25 years, a sentence authorized under 21 U.S.C. § 841(a)(1)(A) (allowing sentences from 10 years to life), but not under section 841(a)(1)(C), allowing sentences only up to 20 years. See statutes quoted at pp. 2-3, above.

At his sentencing, Leon did not object to the use of the enhanced subsection A, allowing a sentence in excess of 20 years. Nor did he raise this on his direct appeal, which was decided on December 23, 1999. *See United States* v. *Guitierrez*, 205 U.S. 1348 (8th Cir. 1999) (unpublished table opinion). Leon's direct appeal was thus fully argued and decided before this Court's decision, in June, 2000, in *Apprendi* v. *New Jersey*, 530 U.S. 466 (2000).

C. *Leon's Habeas Petition*

Apprendi held that in a criminal prosecution, any fact which, by operation of a statutory provision, enhances the sentence beyond the statutory maximum to which a defendant could be subjected absent that fact, must be proved by the government to the jury beyond a reasonable doubt.[2] *Id.* Failure to submit such a sentence-enhancing fact denies a defendant his right to Due Process of law and his right to a trial by jury.

Using *Apprendi* as his basis, Leon filed a timely petition to have his sentence vacated, and to be re-sentenced consistent with *Apprendi.* As the District Court correctly characterized Leon's claim:

> Petitioner now seeks relief under section 2255, claiming that he was sentenced in violation of Apprendi v. New Jersey, (citation omitted). Apprendi held that any fact, other than a prior conviction, which increases the penalty beyond the prescribed maximum

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[2] In *Apprendi,* the defendant (a Caucasian) was convicted of the dangerous use of a firearm, after he had fired a revolver at a house located in a predominantly Caucasian neighborhood which had recently been occupied by an African-American family. The dangerous firearm law imposed a statutory maximum penalty of 10 years in prison. The judge sentenced defendant to 12 years, 8 for violation of the firearm law, and an additional 4 under a separate statutory provision authorizing an enhancement of up to five years for any crime committed with a racial animus.

The jury had not been asked to determine whether defendant had acted with such animus. Instead, the judge made that finding at sentencing.

> must be submitted to a jury and proved beyond a reasonable doubt. Thus petitioner claims that he was improperly sentenced under 21 U.S.C. § 841(a)(1)(A), the sentencing provision for offenses involving certain quantities of controlled substances, and should have been sentenced under § 841(a)(1)(C), the "catch-all" sentencing provision.

(App. 3a).

The District Court, citing the Eighth Circuit decision of *United States* v. *Moss*, 252 F.3d 993, 997 (8th Cir. 2001), *cert. denied*, 122 S.Ct. 848 (2002), then ruled that *Apprendi* could not apply retroactively:

> Apprendi does not apply here. The United States Supreme Court found in Teague v. Lane that only "watershed" rules of criminal procedure apply retroactively to cases on collateral review. 489 U.S. 288 (1989). The Eighth Circuit has concluded that Apprendi is not of watershed magnitude.

(App. 3a and 4a). The District Court also ruled that since Leon had not raised *Apprendi* on his direct appeal, he was barred from doing so as a matter of procedural default.[3] (App. 4a). The Dis-

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[3] This procedural default finding stands or falls with this Court's resolution of the retroactivity issues. 28 U.S.C. § 2255(3) specifically allows petitioner to bring a habeas claim to assert a

trict Court also denied a Certificate of Appealability. (App. 5a). The Eighth Circuit affirmed, without opinion. (App. 5a).

D. *On Its Merits,* Apprendi *Bars Leon's Sentence*

Retroactivity aside for just a moment, *Apprendi* surely would now bar the sentence received by Leon. Section 841(a)(1)(A), under which Leon was sentenced, is triggered by an enhancing fact, namely, distribution of "50 grams or more of methamphetamine." *Apprendi* mandates that this fact be proved to a jury beyond a reasonable doubt. Such proof was not even attempted, nor the issue ever submitted to the jury. Instead, the District Court found that such quantity had been established "by a preponderance of the evidence." Thus Leon should have been sentenced under section 841(a)(1)(C); the subdivision referred to by the District Court as the "catch-all" provision, which applies when no enhancing fact triggers the other subdivisions of section 841(a)(1). Under this subdivision, the longest possible sentence is 20 years. Leon was sentenced to 25 years.

REASONS FOR GRANTING THE WRIT

The Court should accept this case for review as the issue involved is of central importance and there is no uniformity within the Circuits on

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new recognized right announced by this Court. This is precisely what Leon has done by his petition. If the right did not exist before *Apprendi*, it surely could not have been waived.

the issue. Moreover, as a practical matter, given the number of lengthy drug sentences handed down before and at odds with *Apprendi* we submit that this Court will ultimately decide whether pre-*Apprendi* sentences can be collaterally challenged in a section 2255 proceeding. This case presents a clear and concise record for doing so.

A. *The Importance of the Issue*

Pre-*Apprendi* drug sentences were routinely determined by judicial fact-finding as to drug quantities. They were thus routinely imposed in violation of the constitutional principles undergirding *Apprendi*. Juries were never asked to consider the drug quantity, yet in most criminal cases such quantity is really, speaking colloquially, the name of the game. After all, our country is not known for indicting innocent people. The overwhelming number of drug cases thus pose only one real question, namely, the length of the sentence. Until *Apprendi* gave them pause, the federal courts mishandled this central issue in droves. The error is too important to let stand uncorrected. "The fact that the constitutional rights of criminal defendants were violated in a large percentage of cases for a long time by well-meaning prosecutors good judges does not excuse us from remedying those wrongs." *United States* v. *Clark*, 260 F.3d 382, 388 (5th Cir. 2001).

Apprendi itself declares its importance:

> At stake in this case are constitutional protections of surpassing importance: the proscription of any dep-

> rivation of liberty without "due process of law," Amdt. 14, and the guarantee that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial by an impartial jury," Amdt. 6.

Apprendi, 530 U.S at 477, 120 S. Ct. at 2356.

Trial by jury is the central feature of our system of criminal justice. It is "the lamp that shows that freedom lives." *Duncan* v. *Louisiana*, 391 U.S. 145, 156, n.23, 88 S.Ct. 1444, 1451 (1968). Present at the creation and carefully guarded ever since, the Sixth Amendment's right to trial by jury serves "to guard against a spirit of oppression and tyranny on the part of rulers and . . . insisted upon by our ancestors . . . as the great bulwark of their civil liberties." *United States* v. *Gaudin*, 515 U.S. 506, 510-11, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995). The jury system assures "the interposition between the accused and his accuser of the commonplace judgment of a group of laymen." *Williams* v. *Florida*, 399 U.S. 78, 90, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970). Until *Apprendi*, the entire federal criminal court system had simply forgotten that "if the defendant preferred the common-sense judgment of a jury to the more tutored but perhaps less sympathetic reaction of the single judge, he was to have it." *Duncan*, 391 U.S. at 156, 88 S.Ct. at 1451.

B. *Uncertainty Reigns As To* Apprendi's *Retroactivity*

United States v. *Moss*, 252 F.3d 993 (8th Cir. 2001), *cert. denied*, 122 S.Ct. 848 (2002) clearly rules that *Apprendi* is not retroactive.[4] *See also McCoy* v. *United Sates*, 266 F.3d 1245 (11th Cir. 2001), *cert. denied*, 2002 U.S. LEXIS 4265 (2002); and *United States* v. *Sanders*, 247 F.3d 139 (4th Cir. 2001), *cert. denied*, 122 S.Ct. 573 (2001). The Ninth Circuit, in *Jones* v. *Smith*, 231 F.3d 1227 (9th Cir. 2000) made a non-retroactive ruling, but one limited to holding that *Apprendi* could not be used to collaterally attack a discrepancy between the charging document and the jury instructions. These Circuits all so held by reasoning that *Apprendi* announces a new procedural rule, which they concluded was not of "watershed magnitude" as required for retroactive effect under this Court's decision in *Teague* v. *Lane*, 489 U.S. 288 (1989).

A Fifth Circuit opinion was not so quick to jump when the issue of *Apprendi*'s retroactivity came before it. Instead, it remanded the case, filed *in propria persona* by an incarcerated inmate, for a district court determination of whether counsel should be appointed to brief the issues involved. *United States* v. *Clark*, 260 F.3d

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[4] *Moss* itself had a dissent which urged *Apprendi*'s retroactivity. Moreover, after Moss, a district court within the Eighth Circuit ruled that *Apprendi* was retroactive under *Teague*. The reversal by the Eighth Circuit of this minor rebellion came in *Murphy* v. *United States*, 268 F.3d 599 (8th Cir. 2001). *Murphy* noted some sympathy for the dissent in *Moss*, and indicated that Moss's majority could be replaced by an en banc hearing within the Circuit, or by Supreme Court review.

382 (5th Cir. 2001). Clark thus did not decide whether *Apprendi* is or is not retroactive. However, a thoughtful and thorough discussion of the issues by one of the judges shows just why this issue is worthy of this courts consideration. That judge would not have remanded on the question of counsel appointment, but would have instead simply decided the issue of *Apprendi*'s retroactivity.

In dissenting to the remand, the judge in *Clark* correctly notes that retroactivity can come by two separate avenues. First, under *Teague* v. *Lane*, 489 U.S. 288 (1989), where a new procedural rule is of "watershed magnitude," a magnitude found only where observance of the procedure involved is "implicit in the concept of ordered liberty." *Teague*, 489 U.S. at 311. Second, it notes an alternative for finding retroactivity that none of the Circuits had seriously considered, namely, where a Supreme Court ruling refines the definition of an element of a criminal offense. *Davis* v. *United States*, 417 U.S. 333, 346-47 (1974).

The *Clark* dissent then notes that all of the Circuits which have ruled that *Apprendi* was not retroactive have simply made a cursory determination that it announces a new procedural rule which, they baldy conclude, is not subject to the "watershed" exception. Moreover, the *Clark* dissent points out that these Circuit cases do not even discuss the *Davis* basis for retroactivity, namely a refining of the definition of the elements of an offense, which is automatically given retroactive effect.

The Seventh Circuit has not yet ruled definitively on the issue. In one case however, it assumed in dicta that *Apprendi* applied retroactively. *Edwards* v. *United States*, 115 F.3d 1322 (7th Cir. 2001). In another case, that Circuit reversed a district court determination that the retroactive effect of *Apprendi* did not warrant a Certificate of Appealability, with the Seventh Circuit directing that the district court issue such a certificate, since it concluded that the question was substantial. *Ashley* v. *United States*, 266 F.3d 671 (7th Cir. 2001).

The Third Circuit suggested that the watershed exception to *Teague* would be an appropriate vehicle for retroactive application of *Apprendi* to initial habeas corpus petitions under 28 U.S.C. § 2255. *See United States* v. *Ellis*, 2001 U.S. Dist. LEXIS 16980 (U.S. Dist. Maine Oct. 22, 2001) citing *United States* v. *Turner*, 2001 WL 1110349, *4 n4 (3rd Cir. Sept. 21, 2001).

These decisions collectively argue persuasively for a final resolution of the issue by this Court. First, they show uncertainty and are anything but uniform. Second, they show that the issue is here to stay, until put to rest by this Court.

We contend that that retroactivity exists under either *Teague* or *Davis*.

Under *Teague*

Were *Apprendi* found by this Court to be a new procedural rule, it is surely a "watershed." It completely rearranges how defendants are charged, tried and sentenced. It is thus indeed of

"surpassing importance." *Apprendi*, 530 U.S at 477. Justice O'Connor, in dissent, stated that *Apprendi* would "surely be remembered as a watershed change in constitutional law." *Apprendi*, 530 U.S. at 475.

Given the just quoted characterization of *Apprendi*, the overwhelming change it made, the importance of that change, and the quite-cursory discussion of the matter in the cases which hold that *Apprendi* is procedural but not watershed, *Apprendi*'s retroactivity under *Teague*'s "watershed" exception should be considered by this Court.

Under *Davis*

While the Fourth, Eighth, and Eleven Circuits[5] were quick to discard the argument that *Apprendi* made a substantive change (which, under *Davis*, would make it retroactive without regard to any watershed determination), the Fifth Circuit has held that *Apprendi* did make a change in the substantive law. *United States* v. *Doggett*, 230 F.3d 160 (5th Cir. 2000), *cert. denied*, 531 U.S. 1177 (2001).

We urge that the Fifth Circuit is correct. After all, post-*Apprendi* prosecutions under 21 U.S.C. section 841(a)(1) will require different and additional proof of an element, namely, the quantity of the drug involved. As Justice Thomas' concurring opinion in *Apprendi* noted (Justice Scalia joining), "this case turns on the seemingly simple

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[5] *See, United States* v. *Moss*, 252 F.3d 993 (8th Cir. 2001); *United States* v. *Sanders*, 247 F.3d 139 (4th Cir. 2001); and *McCoy* v. *United States*, 268 F.3d 599 (8th Cir. 2001).

question of what constitutes a crime." *Apprendi*, 530 U.S. at 499.

If this Court follows the Fifth Circuit decision of *Doggett*, as the just-quoted pronouncement of Justice Thomas suggests, *Apprendi* will be found substantive, retroactive and thus applicable to petitioner Leon's case. If, alternatively, this Court follows those cases which have concluded that *Apprendi* announces a procedural rule, the nature of that rule's "surpassing importance" should result in this Court concluding, as Justice O'Connor indicated, that *Apprendi* is a watershed rule.

CONCLUSION

For the above-stated reasons, this Court should grant this petition for certiorari.

Respectfully submitted,

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Dated: June 17, 2002

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APPENDIX B

Amended Order of the United States District Court, District of Minnesota, dated January 7, 2002 ..... 2a

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 01-4024

Juan Roberto Leon,	*
	*
Appellant,	*
	* Appeal from the United
United States of	* States District Court for
America,	* the District of
	* Minnesota.
Appellee.	*

Before BOWMAN, FAGG, and RILEY, Circuit Judges

JUDGMENT

This appeal comes before the court on appellant's application for a certificate of appealability. The court has carefully reviewed the original file of the district court, and the application for a certificate of appealability is denied. The appeal is dismissed.
(5361-010199)

March 19, 2002

Order Entered at the Direction of the Court:
/s/
Clerk, U.S. Court of Appeals, Eighth Circuit.

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
97-CR-124 (14) (JMR/JGL)
01-CV-671 (JMR)

Juan Roberto Leon	)	
	)	AMENDED
v.	)	ORDER
	)	
United States of America	)	

Petitioner, Juan Roberto Leon, seeks habeas corpus relief, pursuant to 28 U.S.C. § 2255. Petitioner claims he was improperly sentenced under Apprendi v. New Jersey, 530 U.S. 466 (2000). His claims fails, however, because the rule announced in Apprendi does not afford him relief.

The Eighth Circuit Court of Appeals has held that Apprendi does not apply retroactively to cases on collateral review. United States v. Moss, 252 F.3d 993, 997-1001 (8th Cir. 2001). Moreover, petitioner's motion is procedurally barred because he did not raise this claim on direct appeal.

I. Background

In May, 1998, a jury found petitioner guilty of conspiring to distribute methamphetamine, in violation of 21 U.S.C. § 846. Petitioner was acquitted at the trial of conspiring to launder drug money under 18 U.S.C. § 1956. On March

23, 1999, this Court sentenced petitioner to 300 months in imprisonment.

Petitioner appealed his conviction and sentence, claiming the government failed to prove a single conspiracy; errors in authorizing the use of wire taps; and sentencing errors in the calculation of the amount of drugs distributed and in the failure to find that petitioner was a minimal participant. The Eighth Circuit affirmed petitioner's conviction and sentence. United States v. Gutierrez et al., 205 F.3d 1348 (8th Cir. 1999) (unpublished table decision).

Petitioner now seeks relief under Section 2255, claiming he was sentenced in violation of Apprendi v. New Jersey, 530 U.S. 466 (2000). Apprendi held that any fact, other than a prior conviction, which increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. Thus, petitioner claims he was improperly sentenced under 21 U.S.C. § 841(b)(1)(A), the sentencing provision for offenses involving certain quantities of controlled substances, and should have been sentenced under 21 U.S.C. § 841(b)(1)(C), the "catch-all" sentencing provision. Petitioner further seeks an evidentiary hearing to determine the actual quantity of drugs attributable.

II. Discussion

Apprendi does not apply here. The United States Supreme Court found in Teague v. Lane that only "watershed" rules of criminal procedure apply retroactively to cases on collateral review.

489 U.S. 288, 312 (1989). The Eighth Circuit has concluded that Apprendi is not a "watershed" rule. United States v. Moss, 252 F.3d 933, 997 (8th Cir. 2001) ("[W]e hold today that Apprendi is not of watershed magnitude and that Teague bars petitioners from raising Apprendi claims on collateral review."). Therefore, because petitioner was sentenced before the Supreme Court's decision in Apprendi, the Apprendi decision does not apply to his sentencing on collateral review.

Even if Apprendi did apply, petitioner's motion is procedurally barred because he did not raise this claim on direct appeal. A claim not raised on direct appeal is procedurally defaulted on collateral review unless (1) a petitioner demonstrates cause for the default and actual prejudice or (2) actual innocence. See, e.g., Moss, 252 F.3d at 1001. Petitioner fails to demonstrate either cause and prejudice or actual innocence.

Finally, no evidentiary hearing is required, because the files and records conclusively show that petitioner's claim lacks merit. United States v. Johnson, 751 F.2d 291, 294 (8th Cir. 1984) ("Generally, when factual issues are raised in a § 2255 motion, a hearing should be held; however, where, as here, the record conclusively reveals that the defendant is entitled to no relief, a hearing is not necessary.").

The Court has also considered whether issuance of a Certificate of Appealability is appropriate. See Tiedeman v. Benson, 122 F.3d 518 (8th Cir. 1997). The Court concludes that no issue raised in this motion is "debatable among reasonable jurists." Flieger v. Delo, 16 F.3d 878,

882-83 (8th Cir. 1994). Thus, petitioner has not made "a substantial showing of the denial of a constitutional right," and no certificate will issue. 28 U.S.C. § 2253(c)(2).

Accordingly, IT IS ORDERED that:

1. Petitioner's motion for relief pursuant to 28 U.S.C. § 2255 is denied. [No. 1.]

2. No Certificate of Appealability will issue in this case.

Dated: January 4th, 2001

Nunc pro tunc: November 19, 2001

/s/
JAMES M. ROSENBAUM
United States Chief District Judge